



January 11, 2000

Ms. Kristi LaRoe
Assistant District Attorney
Tarrant County
401 West Belknap
Fort Worth, Texas 76196-0201

OR2000-0103

Dear Ms. LaRoe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID # 131030.

The Tarrant County Sheriff's Department and the Tarrant County Criminal District Attorney's Office (collectively the "county") received two requests for records, videotapes and other information relating to the death of an individual who was incarcerated in the Tarrant County Jail. You inform us that the county has released some of the requested information, including all of the requested policies and procedures. You claim that the rest of the requested documents and videotapes are excepted from disclosure under sections 552.103 and 552.119 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹

We initially note that one of the requestors, Advocacy, Incorporated ("Advocacy"), seeks access to the submitted information under chapter 552 of the Government Code and the federal Protection and Advocacy for Mentally Ill Individuals Act of 1986, as amended, 42 U.S.C. §§ 10801 *et seq.* (the "federal Act").² Advocacy appears to be a "[a] system established in a State under section 10803 of this title to protect and advocate the rights of

¹We assume that the videotape submitted for review is truly a representative sample of the requested videotapes as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This decision does not reach, and therefore does not authorize the county to withhold, any other responsive videotapes whose content differs substantially from that of the videotape that you submitted.

²Advocacy also refers to "the Access Agreement between our organization and Texas Department of Mental Health and Mental Retardation." You have not addressed, and this office is not otherwise informed, of the contents of that agreement. Accordingly, our discussion of Advocacy's request is confined to the language of the federal Act.

individuals with mental illness[.]” 42 U.S.C. § 10805(a); *see also* 42 U.S.C. § 10803. Such a system has statutory authority to “investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred[.]” 42 U.S.C. § 10805(a)(1). Section 10805(a)(4) of the federal Act grants a system access to records relating to:

(A) any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have access;

(B) any individual (including an individual who has died or whose whereabouts are unknown) –

(i) who by reason of the mental or physical condition of such individual is unable to authorize the system to have such access;

(ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the state; and

(iii) with respect to whom a complaint has been received by the system or with respect to whom as a result of monitoring or other activities (either of which result from a complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect; and

(C) any individual with a mental illness, who has a legal guardian, conservator, or other legal representative, with respect to whom a complaint has been received by the system or with respect to whom there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy[.]”

42 U.S.C. § 10805(a)(4). Section 10805 of the federal Act also provides in relevant part that a system “shall . . . have an arrangement with the Secretary [of Health and Human Services] and the agency of the State which administers the State plan under title XIX of the Social Security Act . . . for the furnishing of the information required by subsection (b) of this section.” 42 U.S.C. § 10805(a)(5). Section 10805(b) entitles an eligible system to “a copy of each annual survey report and plan of corrections for cited deficiencies made pursuant to titles XVIII and XIX of the Social Security Act . . . with respect to any facility rendering care or treatment to individuals with mental illness in the State in which such system is located.” 42 U.S.C. § 10805(b).

It would appear to this office that the federal Act grants Advocacy a statutory right of access to information that is otherwise subject to exceptions to disclosure under chapter 552 of the

Government Code. Accordingly, we will consider the various circumstances under which section 10805 of the federal Act grants Advocacy access to such information. Section 10805(b) would not appear to encompass the information that the county seeks to withhold. The fact that the information in question relates to a deceased individual would appear to rule out section 10805(a)(4)(C), and the fact that the other requestor identifies himself as an attorney for the personal representative of the decedent's estate would appear to preclude the applicability of section 10805(a)(4)(B). With regard to section 10805(a)(4)(A), we are not informed whether the decedent was a client of Advocacy or whether he or his legal representative has authorized Advocacy to have access to records relating to him. If the decedent was such a client, and if he or his legal representative has authorized Advocacy to have access to records relating to him, then we believe that the county must release the information in question to Advocacy in accordance with the federal Act. If not, then Advocacy has the same status as that of the other requestor under chapter 552 of the Government Code and is subject to the exceptions to disclosure that the county has raised. *See generally* Attorney General Opinions MW-381 (1981), MW-95 (1979); Open Records Decision No. 598 (1991).

Turning to the information you submitted, we initially note that it includes autopsy records that are made public by statute. Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall be a part of the record. Copies of all records shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11 (West Supp. 2000). Generally, information that is made expressly public by another statute is not subject to an exception to disclosure under chapter 552 of the Government Code. *See* Open Records Decision No. 623 (1994). Accordingly, all autopsy records included in the information in question are public and must be disclosed.

With regard to the exceptions you claim, section 552.103 of the Government Code is the more inclusive. Section 552.103 provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103 (West Supp. 2000). Under section 552.103, a governmental body must establish that: (1) litigation is either pending or reasonably anticipated, and (2) the requested information relates to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). In this instance, you have provided a copy of a notice of claim, alleging negligence and violations of the decedent's civil rights, that was submitted to the county by the other requestor, an attorney, on behalf of the mother and personal representative of the estate of the deceased individual. We therefore conclude that the county has made the requisite showing that the information in question relates to anticipated litigation for purposes of section 552.103 of the Government Code. *See* Open Records Decision No. 638 (1996). Therefore, except for the autopsy records, the information in question is excepted from disclosure under section 552.103.

In reaching this conclusion, we assume that the opposing party to the anticipated litigation has not had access to any of the information in question. To the extent that the opposing party has seen or had access to any of the requested information, there is no interest under section 552.103 in withholding that information from public disclosure. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103 ends once the related litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, any requested information that is confidential by law must not be released even at the conclusion of the litigation. *See* Gov't Code §§ 552.101, 552.352.

As we are able to make a determination under section 552.103, we do not address your claim under section 552.119. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

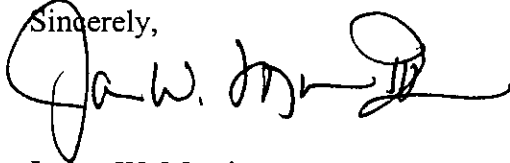
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a large, stylized initial 'J'.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ch

Ref: ID# 131030

Encl. Submitted documents

cc: Mr. Richard N. Haskell
Attorney at Law
P.O. Box 9520
Fort Worth, Texas 76147-2520
(w/o enclosures)